

# **THE ANTIDEFICIENCY ACT**

## **Introduction**

It's all about money – your tax dollars – the appropriation that authorizes the expenditures you make to accomplish your mission and what happens if you don't learn from history.

In this paper you will discover:

- Those valid contracts can create Antideficiency Act violations.
- That the word “voluntary” may not mean what you think it does.
- That the fiscal mistakes we make today could saddle future generations.
- And a lot more about the Antideficiency Act.

## **Background**

The US Constitution gives the Congress the power of the purse. Section 8, Article 1, grants Congress the power to “... lay and collect taxes, duties, imports, and excises, to pay the debts and provide the common defense and the general welfare of the United States....” Section 9 of the same article directs “... no money shall be drawn from the treasury but in consequence of an appropriation made by law.”

This constitutional order is clear. No one in Congress, the Executive Departments, or the Judiciary may obligate or expend public monies until Congress has exercised its Constitutional duty to appropriate funds.

This seems clear enough, but as early as 1819, Congressmen complained on the record about Executive Agencies disregarding the constitutional appropriation process. Funds were obligated without or in advance of appropriations. Funds were co-mingled and used for purposes other than those for which they were appropriated. The Executive Agencies would spend all their funds early in the year and then seek a deficiency appropriation to continue operations. These practices led directly to what we commonly refer to as the Antideficiency Act.

Some of these practices and others (such as obligating expired funds) still exist. Today they bring administrative sanctions. Knowing and willful violations bring criminal prosecutions. Anyone who manages public monies or solicits business for their programs must know and understand the Antideficiency Acts. These Acts operate in conjunction with other fiscal statutes, most notably, the agency appropriations and statutes in Title 31 of the US Code.

Anyone who has experience working on an Antideficiency Act violation will tell you that time spent understanding this law is time wisely spent. We have often heard that we have to act more like a business. This is one area where the law requires us to act like the Government.

### **What is the Antideficiency Act?**

It is not one, but three separate statutes that we will consider in this document.

The basic principle of the Acts is that we must pay as we go. Normally Governmental officials may not obligate, commit, or expend funds to make payments unless sufficient funds are available through the normal appropriation process to cover the cost.

### **The Acts prohibit:**

- a. Making or authorizing expenditure from, or creating, or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law.
- b. Involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose unless law authorizes the contract or obligation.
- c. Accepting voluntary services for the United States, or employing personal services in excess of that authorized by law except in cases of emergency involving the safety of human life or the protection of property; and
- d. Making obligations or expenditures in excess of an apportionment or reappropriation, or in excess of the amount permitted by agency regulations.

You will also learn that the law requires disciplinary and criminal sanctions for violating the Act.

**The key provision** of the Antideficiency Act is 31 USC 1341 (a)(1).

An officer or employee of the United States Government ...may not –

- a. Make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.
- b. Involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

These two prohibitions directly support the Constitutional provisions discussed in the background section. You must understand that a) you violate the law if there are insufficient funds in an account when payment becomes due, and b) the act of obligating the United States to

make a payment when the funds are not already in the account also violates 1341(a). You cannot make expenditures in excess of available appropriations. You cannot make expenditures in advance of appropriations.

## **Exhaustion**

Assessments of Antideficiency Act violations are not frozen at the point of obligation. Once an appropriation is exhausted, the account is obviously no longer available for obligation.

Why should we be concerned about that?

Any obligation made against an exhausted appropriation violates the Antideficiency Act. The Act is violated if

- insufficient funds remain to liquidate an otherwise valid obligation when actual payment is due;
- upward adjustments cause the obligation to exceed available funds.

Even if there are sufficient funds available when a particular contract is signed, if before payment is due, other obligations and payments to contractors exhaust the appropriation, the contract will violate the Antideficiency Act.

Each of us must live within our share of the apportionment or appropriation.

Both the Navy and the Army have experienced substantial exhaustion Antideficiency Act violations. 55 Comp Gen. 768 (1976) discusses the Army situation. It over obligated four procurement appropriations in the aggregate amount of more than 160 million dollars that caused it to halt payments to some 900 contractors. There were adequate funds when the contracts were awarded so the contractors had valid enforceable obligations. The Army recognized its duty to mitigate the Antideficiency Act violation. The GAO sanctioned an option to terminate some of the contracts for convenience even though the termination costs might have to come from a deficiency appropriation.

The Navy obligated and expended \$110 million more than it had in its Military Personnel, Navy appropriation. The GAO concluded while there may have been some concealment, the basic violation was not the result of some evil scheme. The violation was caused by the separation of the authority to create obligations from the responsibility to control them.

One theme that runs through the case law is that **agencies must do everything in their power to cure a potential violation**—stop work, terminate contracts, or freeze spending or programs. You must not allow a violation to exist. Agencies do not appreciate informing Congress and the President that an Antideficiency Act violation exists.

### **Obligations in excess of appropriation**

The United States Supreme Court has stated absent statutory authorization “it is clear that the head of the department cannot involve the government in an obligation to pay anything in excess of the appropriation. Bradley v. United States, 98 U.S. 104, 114 (1878)

Two basic cases represent the way these issues arise. First, when an agency accepted an offer to install automatic telephone equipment for \$40,000 when it had only \$20,000 in the relevant account, it violated the Antideficiency Act, 35 Comp. Gen. 356. In the second case, the Air Force wanted to buy some computer equipment, but did not have funds. Instead it made an initial down payment with the balance of the purchase price to be paid in installments over a period of years. The Comp Gen termed this a sale on credit and because the contract constituted a sale in excess of available funds, it violated the Antideficiency Act 48 Comp. Gen. 494 (1969).

### **The Purpose Statute**

The “Purpose Statute” 31 USC 1301 (a) prohibits the use of appropriations for purposes other than those for which they are appropriated. Making an obligation for a purpose beyond a specific appropriation may violate the Antideficiency Act if no other funds are available for that purpose to cover the obligation. The Comptroller General has explained the relationship between the Purpose Statute and the Antideficiency Act:

Not every violation of 31 USA 1301 (a) also constitutes a violation of the Antideficiency Act...Even though an expenditure may have been charged to an improper source, the Antideficiency Act’s prohibition against incurring obligations in excess or in advance of available appropriations is not also violated unless no other funds were available for that expenditure. Where, however, no other funds were authorized to be used for the purpose in question (or where authorized, were already obligated) both 32 USC 1301 (a) and Section 1341 (a) have been violated. In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriate fund source, although available at the time, was subsequently obligated making readjustments of accounts impossible.

You may not spend any appropriated fund for a purpose other than the purpose for which it was appropriated.

An appropriation may have a ceiling for a particular element within the appropriation. Depending on how the words in the ceiling are drafted, you may violate the Antideficiency Act if you exceed the ceiling amount.

In ECBC we support a number of customers who send us their appropriated funds so that we can perform tasks for that customer. If we expend our funds for the purpose of their appropriation, or if we spend their funds for our purpose unrelated to any specific task we have from them, we violate the Purpose Statute and may violate the Antideficiency Act. In dealing with appropriated fund customers, it pays to follow the advice of Jerry McGuire – “Show me the money!” We may not obligate our funds for that customer’s purpose; we must receive funds from their appropriation.

### **Factors beyond an agency’s control**

The fact that an action beyond our control has caused a deficiency may or may not excuse it. Two cases demonstrate this point. Currency fluctuations have been held to trigger an Antideficiency Act violation. 58 Comp. Gen. 46 (1978), an over obligation resulting from Judicially awarded attorney fees for a case won under the Equal Access to Justice Act did not violate the Antideficiency Act. The distinction in this line of cases appears to be based on the extent to which the agency can act to avoid the over obligation even though it is imposed by some external force beyond its control. In the currency fluctuation case, the Comptroller General was persuaded that the contracting officer had options to avoid the over obligation, such as a Stop Work Order or a Termination for Convenience, 58 Comp. Gen. 46 (1978).

Always remember that the general constitutional and statutory scheme is that we pay as we go. To state the reverse, if we can’t pay, we don’t go. You should recognize that we are expected to take all possible steps to alleviate potential Antideficiency Act violations. Terminating contracts or stopping work can affect programs far beyond the offending contract or expenditure. Know what funds you have available. Live within that funding.

**... unless authorized by law**

You may remember this phrase from 31 USC 1341(a)(1)(B). It requires specific authority to incur an obligation in excess of or in advance of appropriations, not just authority to undertake an activity. For example, statutory authority to acquire land and pay for it from a specified fund is not an authorization by law to acquire land without an appropriation, nor was the authority to conduct hearings the authority to act without an appropriation. An example of an obligation authorized by law for Antideficiency Act purposes is Mandatory entitlement programs administered by the Department of Veterans Affairs.

### **The Second of the Antideficiency Acts is 31 USC 1342**

“An officer or employee of the United States government . . . may not accept voluntary services . . . or employ personnel services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . .”

Section 1342 is a logical extension of Section 1341. This language first appeared in a deficiency appropriation in 1884 and was codified in 1906. This rationale is that an agency must not do indirectly what it is not permitted to do directly. If an agency cannot directly obligate in excess or advance of its appropriations, it should not be able to accomplish the same thing indirectly by accepting ostensibly voluntary services and then presenting Congress with the bill, in the hope that Congress will recognize a moral obligation to pay for the benefits conferred. Congress has been very critical of what have been termed “coercive deficiencies” The prohibition on accepting voluntary services closes the door to one coercive deficiency possibility.

### **Personal Services**

Section 1342 contains a second closely related prohibition. It bans the employment of personal services exceeding that authorized by law. One of the practices this prohibition was designed to correct was a controversial practice in 1884 – lower graded government employees were being asked to volunteer their services of overtime periods in excess of the periods allowed by law which let the agency economize at the employees expense. The employees then filed claims for compensation for the hours they worked.. The law was designed to block this practice.

This prohibition against personal services has most frequently been addressed on issues of whether a government officer or employee, or an individual about to be appointed to a government position, could work voluntarily for nothing or a reduced salary. In 1931 the Attorney General decided that a retired Army officer could be employed as superintendent of an Indian school without additional compensation. In deciding this case, the Attorney General drew a distinction, which the GAO and Justice Department continue to follow – the distinction between “voluntary services” and “gratuitous services”. The key test is whether there is a fixed salary mandated for the position. If the law fixes compensation, an appointee may not agree to serve without compensation or to waive that compensation in whole or in part. If, however, the

salary is discretionary, or if the relevant statute prescribes only a maximum (but not a minimum), the compensation can be set at zero, and an appointment without compensation or a waiver, entire or partial is permissible.

Operation of this rule served to preclude uncompensated service of student interns. This obstacle to employing student interns was overcome in 1978 with the enactment of 5 U.S.C. 3111. This statute permits agencies to accept the uncompensated services of high school and college students, “notwithstanding Section 1324 of Title 31”. This is the authority we use today for student interns.

There is a sort of reverse Report of Survey case on voluntary services. An Agriculture employee had an accident while driving a government-owned vehicle assigned to him for his work. A department official ordered the damaged vehicle towed to the employee’s driveway, to be held there until it could be sold. The GAO allowed the employee’s claim for reasonable storage charges on a *quantum meruit* basis. Agriculture argued it could not pay the claim because it stemmed from a voluntary service. Since the Government did have a role in the employee’s assumption of responsibility for the wreck, GAO found no violation of 31 USC 1342.

Section 1342 covers any type of voluntary service that could have the potential to create a legal or moral obligation to pay the person rendering the service.

### **Exceptions to the 1342 prohibition**

We have briefly examined two exceptions so far – where acceptance of services without compensation is expressly authorized by law and where the government and the volunteer have a written agreement that the services are to be rendered gratuitously with no expectation of future payment.

The statute contains an express – “emergencies involving the safety of human life or the protection of property”. There must be a bonafide emergency not just an inconvenience. Two cases demonstrate the operation of this exception on the safety of human life.

- a. When a man saw a navy seaplane make a forced landing, the GAO denied his claim for towing the seaplane two miles to the nearest island. The aircraft had landed in tact and the pilot was in no immediate danger. Rendering service to overcome mere inconvenience or even a potential future emergency is not enough to overcome the statutory prohibition. 10 Comp. Gen. 248 (1930).
- b. The SS Rexmore, a British Vessel, deviated from its course to answer a distress call for help from an Army transport ship carrying over 1,000 troops. The ship had sprung a leak and appeared to be in danger of sinking. The Comptroller General allowed a claim for the vessels actual operating costs plus lost profits attributable to the services performed. The Rexmore had rendered tangible services in

an emergency to save the lives of the troops and to save the ship itself. 2 Comp. Gen. 799 (1933).

Two other cases demonstrate the operation of this exception for the protection of property. Property must be either government owned property or property for which the Government has some responsibility.

- a. An individual gathered up US Mail scattered in a train wreck and delivered it to a nearby town. The government did not own the mail, but it did have a responsibility to deliver it. The Comptroller of the Treasury determined these services came within the statutory exception and the individual could be paid for the value of his services, 9 Comp. Gen. 182 (1905).
- b. A municipality which had rendered fire fighting assistance to prevent the destruction of federal property where the federal property was not within the territory for which the municipality was responsible. The Comptroller General determined these services were within the exception. 3 Comp. Gen 979 (1924)

### **The third statute in the Antideficiency Act is 31 USC 1517**

This is sometimes called the apportionment statute because it states that you may not make or authorize an expenditure or obligation exceeding an apportionment or an administrative division of an apportionment. If you do, then 1517 requires the Secretary of the Army to “report immediately to the President and the Congress all relevant acts and a statement of actions taken.”

There are several points to understand here.

- We normally do not receive an appropriation in a lump sum. It is apportioned to us. An apportionment is a distribution by the Office of Management and Budget of amounts available in an appropriation into amounts available for specified time periods, activities, projects, objects or combinations thereof.
- The Secretary may establish further administrative controls on the money you receive and you are legally required to comply with any such administrative division.

No one wants to have to report a violation of the Act to the President and the Congress. We must pay as we go and take all possible steps to cure a violation.

### **Intent**



What if you have found a really good deal for the program? The fact that an officer or employee was ignorant of the fact, or was simply acting in good faith, or was trying hard to get the Government a good deal, is not relevant to a determination that a particular obligation or expenditure violates the Antideficiency Act. The Comptroller General has held that a violation speaks for itself. Intent may influence the applicable penalty, but it does not affect the basic determination that a violation has occurred.

### **Administrative and Criminal Penalties.**

Two statutes authorize adverse personnel actions for individuals who violate the Antideficiency Act. These statutes authorize penalties up to removal from Federal Service in appropriate cases.

I have seen the Army sanction Commanders and their subordinates for violations involving significant sums for construction and for small sums spent for mementos. In the past, the Army sought only the highest-ranking officer or employee with knowledge of a violation, but now administrative action can be taken against virtually anyone involved. Violations are so embarrassing to the command and damaging to individuals, that each of us must act as early as we can to head off a violation. We have had two recent violations within SBCCOM. Everyone involved will tell you that an ounce of prevention would have been far easier to take than the pound of cure that the investigation, reporting, and sanctions represent.

Violation of the Antideficiency Act may also be prosecuted as a **felony**. Two other statutes authorize Criminal penalties for knowing and willful violations of the Act – two years in jail and a \$5,000 fine. To date, I don't believe any Army Official has been criminally prosecuted, but no one should want to be the first. Those of you who remember the effect of the Criminal Prosecutions of the "Aberdeen Three" over the environmental violations at the Pilot Plant understand the substantial personal, financial, and professional toll a prosecution can take on an individual and the family.

### **Conclusion**

We may not expend funds in excess of an appropriation or in advance of one; we may not accept voluntary or personal services; and we may not violate an apportionment or an administrative division of funds.

We must take the taxpayers money seriously. Understanding the Antideficiency Act is an important step in understanding the appropriation philosophy of the government. We must pay as we go. While we know that budget deficits have occurred, we must recognize that the deficits resulted from the Appropriation process, not from Antideficiency Act violations.

Violations are an anathema. We must understand that AMC and DA expect us to avoid violations. If we discover a potential violation we must take every reasonable step we can to cure it.